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August 2017 Summaries of Fourth Circuit Decisions

New trial awarded for improper judicial commentary

U.S. v. Lefsih, ___ F. 3d ___ 2017 WL 3469214 (4th Cir. August 14, 2017). The defendant, an Algerian national, was selected by lottery to receive a permanent residence visa by way of the Diversity Immigrant Visa Program. That program recruits immigrants from countries that typically do not have high rates of migration to the United States in an effort to bolster overall immigration diversity. Immigrants receiving this special visa are not subject to the same restrictions and supervision as, for instance, student-visa holders. One benefit to recipients of the program is the ability to apply for naturalization after five years. The defendant "won" the lottery, immigrated to the U.S., and eventually applied for naturalization. When asked on the naturalization application whether he had ever been "arrested, cited or detained by any law enforcement officer . . . for any reason", the defendant answered negatively, despite having received numerous traffic citations in North Carolina. He was charged with two counts of immigration fraud and two counts of making a false statement on a naturalization form. Both offenses have as an element that the defendant acted knowingly. The defendant maintained that he misunderstood the scope of the question on the form.

At trial, the district court judge made several remarks disparaging the immigration program, as well as the people that benefitted from it. In the presence of the jury, the trial court voiced disbelief about the existence of the program, opined that most Americans were probably not aware of the program, and expressed that the program was "incredible." The trial court went on to remark about the educational and skill levels of immigrants in the program, and asked if lottery winners may "drag along [their] ten kids and four wives or what," among other disparaging comments. The defendant did not object to these comments. The judge informed the jury during instructions at the beginning and end of the case that the court was impartial and that jurors were not to consider any questions or comments of the judge as expressing an opinion on the case. The jury convicted on all counts after 30 minutes of deliberation.

The Fourth Circuit, applying plain error review, reversed. The court noted that under plain error doctrine, "We may not intervene unless the judge's comments were so prejudicial as to deny the defendant an opportunity for a fair and impartial trial." The court found these comments were prejudicial under this standard. While observing that it is at times proper for the trial judge to comment on evidence or ask clarifying questions in the interest of trial management, it noted that even permissible comments can create prejudice where the comments are directed at only one side and allow the jury to infer bias by the court. Here, the comments did much more than that. "This jury . . . would have no need to deduce from a pattern of interruptions or questions that the district court was skeptical of the defendant; here, the district court conveyed that skepticism directly." Given that this was an immigration fraud case and that the defense turned solely on the defendant's credibility, the trial judge's comments likely gave the jury a negative impression of the program and its participants, including the defendant. The judge's comments had nothing to do with the evidence in the case and served no case management purpose. The remarks were therefore erroneous. As to whether this error was prejudicial, the panel stated that the government's evidence was sufficient but not overwhelming

and noted that the comments of the trial judge came before the defendant testified. It went on to find that this was not a case where a "single [improper] comment" was made, nor were the judge's comments made towards both parties equally, factors that could affect the prejudice analysis. The short time period in which deliberations were concluded indicated a prejudicial impact on the verdict. Finally, the court's curative instructions were insufficient to rectify the error. Those instructions were not given at the time of the improper comments and did not reference the judge's comments. The panel concluded that the trial judge's comments were prejudicial to the point of affecting the integrity of the trial and ordered the conviction vacated.

Government's grand jury subpoena for defense team's files quashed in part; crime-fraud exception did not warrant access to opinion work product of attorneys

In Re: Grand Jury Subpoena, ___ F.3d ___ 2017 WL 3567824 (4th Cir. August 18, 2017). After a trial, government attorneys noticed what appeared to be a forgery in a defense exhibit used at trial. On request, the defense team provided a higher-quality copy of the document to the government. This led the government to seek interviews with the defense attorney and investigator. When the defense team declined to be interviewed, a grand jury issued subpoenas to compel their testimony. The defense team filed a motion to quash on the ground that the government sought privileged work product. After the government agreed to narrow the scope of its questions to (1) where the document was obtained, (2) how it was obtained, and (3) what the witness said to the defense team when providing the document, the district court denied the motion to quash. It found that the crime-fraud exception to the work product privilege applied and ordered the defense team to comply with the subpoena.

A divided court of appeals affirmed in part and reversed in part. The court first recognized the distinction between fact and opinion work product. Fact work product is "a transaction of the factual events involved and may be obtained upon a mere showing of both a substantial need and an inability to secure the substantial equivalent of the materials without undue hardship." Opinion work product is "the actual thoughts and impressions of attorneys," which "enjoys near absolute immunity and can only be discovered in very rare and extraordinary circumstances." The crime-fraud exception can operate to pierce the privilege where the government makes a prima facie showing that "(1) the client was engaged in or planning a criminal or fraudulent scheme when he sought the advice of counsel to further that scheme and (2) the documents containing [the privileged materials] . . . bear a close relationship to the client's existing or future scheme to commit a crime or fraud." The crime-fraud exception can apply to both types of work product, but to obtain opinion work product under the exception there must be a showing that the attorney knew of or participated in the crime or fraud. Here, there was no such showing. "Because the government does not claim that the Defense Team was aware of the Defendant's alleged crime or fraud, the reach of the grand jury's subpoena under the crime-fraud exception is limited to fact work product." Reviewing Supreme Court precedent, the court noted that witness interviews fall in the category of opinion work product. "A lawyer's recollection of a witness interview constitutes opinion work product entitled to heightened protections." Thus, the government was foreclosed from asking what the witness said to the attorney when providing the fraudulent document, and the district court order denying the motion to quash was reversed to that extent. As to the first two questions, where and how the document was obtained, the court found that this request sought only fact work product. The government had satisfied its burden both as to the need for the information and

the applicability of the crime-fraud exception. The denial of the motion to quash was affirmed as to those inquiries.

Pretrial restraint of substitute property under 21 U.S.C. § 853 no longer allowed

U.S. v. Chamberlain, ___ F.3d ___ 2017 WL 3568493 (4th Cir. August 18, 2017). 21 U.S.C. § 853, the general criminal forfeiture statute, allows the government to seize funds tied to the commission of the criminal offense once a defendant is convicted. Under subsection (e) of that statute, the government may seek an order from the district court to freeze any such "tainted" assets of a criminal defendant that would become subject to forfeiture in the event of a conviction where there is a risk that the property will not be available for forfeiture, such as when the property will be spent, sold, or destroyed. Subsection (p) of the statute authorizes the seizure of a defendant's "untainted" or substitute property to satisfy the government's claim of forfeiture where the tainted property is no longer available. The Fourth Circuit had long interpreted these provisions to allow for the pretrial forfeiture of a defendant's substitute property, subject only to constraints on the defendant's right to counsel (i.e. so long as the forfeiture of substitute property did not constrain the defendant's ability to hire counsel of their choice). The defendant was charged defrauding the federal government of approximately $200,000 to be used in Afghanistan for military and humanitarian purposes while serving in the military there. The government gave notice of their intention to seek an order of forfeiture for the amount of the funds allegedly embezzled and, in the event those funds were no longer available, to seek forfeiture of any substitute property of the defendant under 21 U.S.C. 853(p). The government later sought an order prohibiting the defendant from selling real estate that he owned with his wife as substitute property to satisfy the expected forfeiture. The defendant conceded that such an order would not interfere with his ability to hire counsel, but argued that *Luis v. United States*, 578 U.S. ___, 136 S. Ct. 1083 (2016), cast the circuit precedent on this issue into doubt. The district court found such a pretrial order of forfeiture of substitute property was still permissible despite *Luis* and restrained the defendant from selling the real estate. The Fourth Circuit reversed, finding that the reasoning of *Luis* and the plain language of the statute mandated a different interpretation of Section 853. The Fourth Circuit had previously relied on *U.S. v. Monsanto*, 491 U.S. 600 (1989), which directed that federal forfeiture statutes should be interpreted liberally to effectuate their purpose, in giving Section 853 an expansive interpretation. *Luis*, on the other hand, drew a sharp distinction between tainted assets and untainted assets. "The contention that 'property – whether tainted or untainted – is subject to pretrial restraint, so long as the property might someday be subject to forfeiture . . . asks too much of [the Court's] precedent,'" citing *Luis*. The panel noted that the circuit's position on this issue had not been followed by any other circuit, and that at least seven circuits expressly rejected its interpretation. Further, unlike other forfeiture statutes that expressly allow for the pretrial restraint of substitute property, the court found that the lack of such authorization in Section 853 to be determinative. "When Congress intends to permit the government to restrain both tainted and untainted assets before trial, it has clearly provided for such authority. Lacking such express authorization, Section 853(e) does not by its terms permit the pretrial restraint of substitute assets." If the defendant is convicted and the tainted assets are not available for forfeiture, the government may then seek forfeiture of substitute property. Without a conviction, however, the pretrial restraint of substitute assets under Section 853 (as well as comparable RICO forfeiture provisions) cannot be allowed.